

1 THE HONORABLE ROBERT S. LASNIK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 AVOCENT REDMOND CORP., a
11 Washington corporation,

12 Plaintiff,

13 vs.

14 ROSE ELECTRONICS, a Texas general
15 partnership; PETER MACOUREK, an
16 individual; DARIOUSH "DAVID"
17 RAHVAR, an individual; ATEN
18 TECHNOLOGY INC., a California
19 corporation; ATEN INTERNATIONAL
20 CO., LTD., a Taiwanese Company;
TRIPPE MANUFACTURING
COMPANY, an Illinois corporation;
BELKIN INTERNATIONAL, INC., a
Delaware corporation and BELKIN INC.,
a Delaware corporation

21 Defendants.

22 Case No. 2:06-CV-01711 (RSL)

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**DEFENDANTS' REPLY IN
SUPPORT OF DEFENDANTS'
MOTION FOR LEAVE TO
AMEND INVALIDITY
CONTENTIONS**

REPLY RE: MOTION TO AMEND
Case No. 2:06-cv-1711 (RSL)

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1 **I. INTRODUCTION**

2 Avocent's opposition fails for at least four reasons.

3 First, Avocent's claim that the prior art is not material is simply not accurate. Not only is
 4 the prior art at issue material, it is perhaps the most material prior art located in this litigation to
 5 date. For example, the 102(g) defense applies to all claims of all three asserted patents. It was
 6 the basis of a summary judgment motion that remained undecided in the COFC case¹ and it drove
 7 the settlement of that case.² Materiality is also evidenced by the fact that after 15 years of arguing
 8 that Avocent conceived of the alleged invention no earlier than April/May 1995, Avocent
 9 suddenly changed its alleged date-of-conception-of-the-invention story to try to circumvent that
 10 prior art defense only after the 102(g) defense was disclosed and only after Avocent deposed a
 11 third party witness in that case (a witness who corroborated the fact that Rose conceived the
 12 alleged invention years before Avocent had claimed). Avocent has only recently similarly
 13 changed its conception story in this litigation.³ Avocent would not risk the damage to its
 14 credibility by attempting such a drastic change to its position at this time if the prior art at issue
 15 was not material. Moreover, the other prior art references are clearly material as they were the
 16 basis for the USPTO's finding new issues of patentability in the intervening reexaminations.⁴

17 Second, the Court should reject Avocent's attempt to make much of the fact that the
 18 supporting declarations from ATEN and Belkin's attorneys state that the references were
 19 "unknown" or their "significance was not fully appreciated." This argument is a red herring. The
 20 "not fully appreciated" phrase was included because one of the references, the Polycon reference,
 21 was in the possession of ATEN and Belkin but was not fully appreciated until after the Stay was
 22 entered, and its significance arose then only in combination with other newly discovered
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24 ¹ *Avocent Redmond Corp. v. United States & Rose Electronics (Intervenor)*, No. 08-69C (Ct. of Fed. Cl.
 25 Jan. 31, 2008) ("COFC case")

26 ² Decl. of Jeffrey J. Phillips ISO Defendants' Reply Re: (1) Motion for Leave to Amend, and (2) Motion to
 27 File Under Seal ("Phillips Decl.") ¶ 8, filed concurrently.

28 ³ Declaration of Ming T. Yang ISO Defendants' Reply Re: Motion for Leave to Amend ("Ming Reply
 29 Decl.") ¶ 1-2, filed concurrently.

30 ⁴ Phillips Decl. ¶ 16. Indeed, one of the patents still stands rejected on that basis.

1 references.⁵ Importantly, both Belkin and ATEN's attorneys do state unequivocally that *they*
 2 *had no knowledge of the existence or the significance* of the Rose's 102(g) defense.⁶ Nor could
 3 they have, as that information was within the sole possession of Rose and was not asserted by
 4 Rose until after this case was stayed in 2007.

5 Third, Avocent's "prejudice" argument is similarly misplaced. Avocent has known of this
 6 prior art for a significant period of time, as that art was first submitted in the COFC case.⁷
 7 Avocent and its present lawyers have also been litigating these patents continuously since 1998.
 8 During that time, Avocent has, in depositions, trial testimony and interrogatory responses,
 9 consistently claimed a conception date between April and May/June, 1995 and thus was obligated
 10 to preserve documents relevant to that claim.⁸ Avocent now says it may have destroyed
 11 documents in 2008. Even if true, that fact is irrelevant to this motion and represents a self-
 12 inflicted wound that does not justify denial of the Defendants' motion to amend.

13 Fourth, is the Court should also reject Avocent's argument that the motion should be
 14 denied because defendants sought to file the expert report of Dr. Eisenbath and Rose's 102(g)
 15 prior invention Summary Judgment Motion papers under seal. It was Avocent who designated
 16 these materials as Confidential Attorneys Eyes Only in this case.⁹ Moreover, Avocent filed its
 17 infringement contentions in this case under seal. Docket No. 148. Avocent's actions speak far
 18 louder than its words.

19 At the end of the day, Belkin and ATEN merely seek to bring this case up to date with
 20 Avocent's activities in other courts during the period in which this case was stayed. It is
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22 ⁵ Declaration of Vision L. Winter ISO Defendants' Reply Re: Motion for Leave to Amend ("Winter Reply
 23 Decl.") ¶ 3 (filed concurrently); Ming Reply Decl ¶ 3; Phillips Decl. ¶ 17.

24 ⁶ Declaration of Vision L. Winter ISO Defendants' Motion for Leave to Amend Invalidity Contentions
 (DE 284) ¶ 11; Declaration of Ming T. Yang ISO Defendants' Motion for Leave to Amend Invalidity
 Contentions (DE 285) ¶ 3.

25 ⁷ Phillips Decl. ¶¶ 5-13⁸ See the 102(g) summary judgment papers at page 2 [APX_1055174]. DE 290, p.
 2.

26 ⁹ Reply Declaration of Yasser M. El-Gamal ISO Defendants' Reply Re: (1) Motion for Leave to Amend,
 & (2) Motion to File Under Seal ("El-Gamal Reply Decl.") ¶ 3, filed concurrently.

1 undisputed that all of this prior art or combinations of prior art were developed or uncovered in
 2 connection with intervening litigation brought by Avocent during the stay. Incorporating this
 3 prior art is not only justified under such circumstances, it may also have the added benefit of
 4 streamlining this case. For example, the 102(g) prior art is applicable against all the asserted
 5 claims in this case and, for this reason, could potentially resolve the entire case.

6 **II. DEFENDANTS HAVE DEMONSTRATED GOOD CAUSE**

7 Belkin and ATEN have demonstrated good cause by their recent discovery of material
 8 prior art despite earlier diligent search.

9 **A. Defendants Were Not Aware of the Newly Discovered Prior Art**

10 Despite Avocent's attempt to conflate them, Belkin and ATEN are not Rose. The prior art
 11 activities of Rose were entombed within Rose's institutional records. These records were not
 12 uncovered by Rose until after this case was stayed and remained unknown to both Belkin and
 13 ATEN until recently.

14 As to the other prior art, Avocent flooded defendants with a production of over 800,000
 15 pages -- 700,000 of which were produced *after* defendants' original invalidity contentions were
 16 served and only a few months before the Stay was entered. Despite best efforts to review the
 17 documents, neither ATEN nor Belkin were in possession of the prior art, with the exception of the
 18 Polycon reference. However, as counsel for ATEN and Belkin have stated, they did not
 19 appreciate its significance until after the Stay was entered and only then in combination with
 20 other newly discovered references.¹⁰

21 **B. The Newly Discovered Prior Art is Material**

22 Belkin and ATEN have established that the new prior art is material as shown in: (1) the
 23 Expert Report of Steven Eisenbarth, Ph.D. PE (including the invalidity claim charts attached as
 24 Exhibits thereto) served on Avocent on November 23, 2009 by Defendant Rose Electronics in the
 25 COFC case; and (2) Rose Electronics' Motion for Summary Judgment of Invalidity of All 17
 26 Claims Asserted Against the ServeView Pro Product Based on 35 U.S.C. § 102(g), filed under

27 ¹⁰ Yang Reply Decl ¶ 3; Vision Reply Decl. ¶ 3.
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1 seal on April 29, 2010, also in the COFC case. Importantly, even Avocent now admits the new
 2 prior art references “are better than the 2007 Aten/Belkin contentions.”¹¹

3 **C. Defendants Have Been Diligent in their Search for New Prior Art**

4 **1. The Rose 102(g) Prior Art Was Uncovered After the Stay**

5 Simply stated, Belkin and ATEN could not have known about Rose’s prior art invention
 6 defense before the Stay was entered in this case because even the Rose litigation team did not
 7 discover and develop that defense until after the Stay. The evidence of Rose’s conception,
 8 diligence, and reduction to practice of an invention that anticipates the claimed invention in the
 9 patents-in-suit consists almost entirely of confidential, proprietary Rose information, which could
 10 not have been independently developed and understood by either Belkin or ATEN before the Stay
 11 was entered.

12 **2. Avocent Resisted Disclosure of the Japanese Prior Art References**

13 This Japanese prior art was produced after defendants’ initial invalidity contentions, and
 14 the defense based upon it was developed in subsequent litigation after the Stay was entered. This
 15 was necessarily the case since Avocent produced the Japanese file histories containing the
 16 Horiuchi and Ishihara references (in Japanese) on August 3, 2007, after the defendants’ original
 17 June 15, 2007 invalidity contentions and only a couple months before the October 30, 2007
 18 Stay.¹²

19 This Japanese file history and prior art have been the subject of a long running effort by
 20 Avocent to suppress their disclosure. Despite Raritan’s struggles to obtain this information in
 21 *Raritan I*, Avocent’s August 3, 2007 production of the Japanese file history was incomplete and
 22 primarily in Japanese, including the important Horiuchi and Ishihara references.¹³ It was only
 23
 24

25 ¹¹ Avocent’s Opposition to Defendants Motion for Leave to Amend Invalidity Contentions. DE 293, at p.
 26 3. As mentioned, further confirming materiality is Avocent’s recent attempts to change its date-of-
 27 conception story in light of that prior art defense.

28 ¹² Phillips Decl. ¶ 14-15.

¹³ Phillips Decl. ¶¶ 15-16.

1 after Rose's efforts (and the Court's intervention) in the COFC case (in 2009) that the full
 2 Japanese prosecution history became available to Belkin and ATEN.¹⁴

3 The complete files, including the English translation, have long been in Avocent's
 4 possession.¹⁵ Belkin and ATEN could not have known about Horiuchi and Ishihara and their
 5 significance prior to the Stay given the amount of documents produced by Avocent and
 6 Avocent's efforts to resist their disclosure.

7 **3. The Third Group of Prior Art Was Developed After the Stay**

8 The third group of prior art comprises of the Diefendorff, PolyCon, Engelbart, Howse, and
 9 Tragen/Q-Net references. Like the prior art in the Rose 102(g) defense, this prior art was also
 10 developed in connection with the COFC case and other subsequent proceedings. Additionally,
 11 the corresponding Q-Net product and the Diefendorff, Engelbart, and Howse references were not
 12 found until after the Stay was entered in this case.

13 **D. Avocent Defended Against the New Prior Art In Subsequent Proceedings Such**
 14 **That Its Introduction Here Will Not Cause Undue Prejudice**

15 While Belkin and ATEN acted promptly in seeking to amend their preliminary invalidity
 16 contentions, Avocent will not be prejudiced by the proposed amendments for several reasons.

17 First, Avocent has long been aware of facts underlying the proposed amendments and the
 18 amendments will not require significant additional resources by Avocent, as this prior art was
 19 already addressed in the subsequently-filed COFC and *Raritan II* cases. Thus, allowing the
 20 amended invalidity contentions will not result in any material change in the parties' burdens nor
 21 increase the burden on this Court. In fact, it may significantly alleviate that burden, as the 102(g)
 22 defense may well terminate the case.

23 Second, Avocent's "document destruction" argument is meritless. Distilled to its essence,
 24 Avocent seeks to benefit from destroying its own evidence. Avocent asserts that there is a
 25 possibility that relevant documents were not preserved in 2008 when it supposedly moved

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 27 ¹⁴ Phillips Decl. ¶ 14.

¹⁵ Phillips Decl. ¶ 15.

1 buildings. The weakness of this position is reflected by the declarations of Bealsey and Foster.
2 Notably, those declarations refer to searching for documents relating to products sold to
3 Microsoft in 1990 and having nothing to do with documents relating to conception of the asserted
4 patents.

5 Third, the proposed amendments will not require a change in the Case Schedule. Because
6 this prior art has been litigated elsewhere already, discovery should be very limited. The case
7 schedule will not be derailed by such limited discovery.

8 **III. CONCLUSION**

9 There is no valid reason to deny amendment and every reason to allow it. Defendants have
10 clearly shown good cause to amend. The proposed amendments are timely, material, and are not
11 prejudicial to Avocent (aside from the merits of the prior art). On the flip side, not allowing this
12 amendment will be unduly prejudicial to defendants, and could allow invalid patents to remain in
13 effect, contrary to strong public policy. For these reasons, the Defendants respectfully request
14 that the Court grant them leave to amend their invalidity contentions.
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17 Dated: December 16, 2011

Respectfully Submitted,

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/s/ Michael A. Moore

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SEAL

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10 Dated: December 16, 2011

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CERTIFICATE OF SERVICE

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 2 the Clerk of the Court using the CM/ECF system which will send notification of such filing to
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